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FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

110 FERC ¶61,182

February 24, 2005

In Reply Refer To:
El Paso Natural Gas Company
Docket No. RP05-160-000

El Paso Natural Gas Company
Post Office Box 1087
Colorado Springs, CO 80944

Attention: Catherine E. Palazzari
Vice President

Reference: Prospective Sale of Available Capacity

Dear Ms. Palazzari:

1. On January 25, 2005, El Paso Natural Gas Company (El Paso) filed a tariff sheet[1] specifying a timeline for the prospective sale of available firm capacity. The tariff sheet is accepted effective February 24, 2005, subject to conditions.

2. El Paso's revised tariff establishes a timeline applicable to the prospective sale of firm transportation capacity. The revised tariff specifies limits on how far in advance of time the service is requested that the transportation service can be requested to begin. Limits are divided into three time periods based on the length of requested transportation service. Exceptions to these timelines can be considered, on a not unduly discriminatory basis, for capacity: (1) associated with an open season, (2) that attaches new/incremental supply or new/incremental markets to the El Paso system, (3) that is available due to contract termination or contract volume reduction under an existing contract, or (4) that involves the modification or construction of facilities or the issuance of any necessary certificate authorization. El Paso states that the exceptions will provide shippers and El Paso with the flexibility to address the needs of a dynamic marketplace, while the capacity sales timeline establishes a generally applicable schedule for the timing of requests for firm service.

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[1] Original Sheet No. 290B, Second Revised Volume No. 1A.

3. The filing was noticed on January 28, 2005, with comments, protests or interventions due on or before February 7, 2005. All timely motions to intervene and all motions to intervene out-of-time filed before the issuance of this order are granted pursuant to Rule 214 of the Commission's Rules of Practice and Procedure.[2]

4. Timely motions to intervene were filed by UNS Gas, Inc., Public Service Company of New Mexico (PNM), Phelps Dodge Corporation, Southwest Gas Corporation (Southwest), Duke Energy Trading and Marketing L.L.C. and Duke Energy Marketing America, LLC, Southern California Gas Company and San Diego Gas & Electric Company, Texas Gas Service Company, a Division of ONEOK, and El Paso Municipal Customer Group.

5. Timely protests were filed by PNM, Southwest, and jointly by Texas Gas Service Company, a Division of ONEOK and El Paso Municipal Customer Group (TG-MCG). None of these protests objected to the specific timelines proposed by El Paso for prospective sales of available capacity.

6. PNM protested that the proposal confers on El Paso the discretion to deny a valid request for service. PNM requests that the Commission direct El Paso to revise the proposed tariff sheet to define a valid request for service and to omit any introductory language that would grant the discretion to deny a valid request for service.

7. The Southwest protest argues that the exceptions should be removed entirely from the tariff because the exceptions create the potential for undue discrimination. Southwest further argues that if the exceptions are not removed entirely, the tariff should be modified to: (1) specify that existing capacity will not be sold more than one year in advance, (2) remove the second exemption for new/incremental because it is unduly discriminatory, (3) reference and abide by the existing tariff language dealing with the sale of future capacity in conjunction with expansion projects, (4) require El Paso to post all capacity that El Paso believes will become available during the 12 month period in which advanced sales would be permitted, and (5) reflect a competitive bidding process for any advanced sale of existing capacity under the exceptions.

8. The TG-MCG protest argues that the exceptions to the timelines appear to be vague, unsupported, and potentially unduly discriminatory. Specifically, the TG-MCG protest argues that: (1) the second exception provides no guidance as to how El Paso will determine whether supplies or markets are new/incremental; (2) the proposed provisions may conflict with existing provisions of El Paso's tariff dealing with "Capacity Reserved for Future Expansion Projects"; and (3) the tariff must provide for notice when a grant of future capacity is made under the exceptions.

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[2] 18 C.F.R. § 385.214 (2004).

9. El Paso filed an answer to the protests and Southwest filed an answer-to-the-answer. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept either El Paso's answer or Southwest's answer-to-the-answer, and will therefore reject them.

Discussion

10. The Commission believes that the proposed timelines are consistent with Commission policy and will alleviate concern about capacity being tied-up without payment. Accordingly, the Commission will accept the proposed timelines. However, while the exceptions provide some flexibility when applied on a not unduly discriminatory basis, they are somewhat vague as drafted.[3]

11. The exceptions regarding capacity associated with either an open season or with new markets are vague and further, they do not deal with the creation of potentially conflicting Rights of First Refusal (ROFR) between shippers when capacity is sold for more than a year in advance. The exceptions to the timeline would permit El Paso to sell capacity more than a year in advance of service commencement. El Paso is required to offer any such capacity for sale to others during the interim period. To the extent an interim shipper purchases the capacity at the maximum rate for a year or more, the interim shipper is entitled to a ROFR under section 284.221(d) of the Commission's regulations and El Paso's tariff, absent an exemption from the ROFR in El Paso's tariff. El Paso stated in the transmittal letter that is unsure whether it would be willing to sell capacity for more than a year in advance, but if it chooses to do so it expects to file for tariff language limiting the ROFR for the sale of the interim capacity. The Commission finds El Paso's explanation as to the delay in solving this ROFR conflict inadequate. The Commission directs El Paso to file a tariff revision consistent with the Commission's findings in the Gas Transmission Northwest Corporation (GTN) Order on Remand[4] and Northern Natural Gas Company (Northern Natural) Order on Rehearing[5]

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[3] The Commission has approved timelines for other pipelines, *e.g.*, *Texas Eastern Transmission* LP, 106 FERC ¶ 61,018 (2004); *Tennessee Gas Pipeline Company*, 105 FERC ¶ 61,167 (2003); and *ANR Pipeline Company*, Delegated Letter Order, June 9, 2003. The Commission has also previously approved a tariff with the same timelines and exceptions as the instant proposal, *see Colorado Interstate Gas Company*, Delegated Letter Order, January 19, 2005.

[4] *Gas Transmission Northwest Corp.*, 109 FERC ¶ 61,141 (2004).

[5] *Northern Natural Gas Co.*, 109 FERC ¶ 61,388 (2004).

12. Additionally, the second exemption, regarding capacity that attaches new/incremental supply or new/incremental markets to the El Paso system, is vague as to what is contemplated or how it would be determined. The Commission directs El Paso to file a tariff revision which either provides more specificity as to what is contemplated under this exception or removes this exception entirely.

13. The Commission finds that El Paso's existing tariff already contains provisions pertaining to the third exception, regarding capacity that is available due to contract termination or contract volume reduction under an existing contract. The fourth exemption, regarding capacity that involves the modification or construction of facilities or the issuance of any necessary certificate authorization, is similarly addressed by other existing tariff provisions, so no further clarification of these exemptions is necessary.

14. Nor is further clarification of the El Paso proposal needed regarding potential undue discrimination or notification of the granting of an exemption. Exceptions must be offered on a not unduly discriminatory basis. In addition, Commission regulations require that "[t]he Transmission Provider must maintain a written log, available for Commission audit, detailing the circumstances and manner in which it exercises discretion under any terms of the tariff. The information contained in this log is to be posted on the OASIS or Internet Web site within 24 hours of when a Transmission Provider exercises its discretion under any terms of the tariff."[6]

15. Therefore, the Commission will accept the proposed tariff sheet subject to El Paso refiling within 15 days to either remove or further clarify its exceptions as discussed above. Further, El Paso is required to file tariff sheets reflecting the Commission policy as described in the GTN and Northern Natural orders.

By direction of the Commission.

Linda Mitry,
Deputy Secretary.

[6] 18 C.F.R. § 358.5(c)(4) (2004).